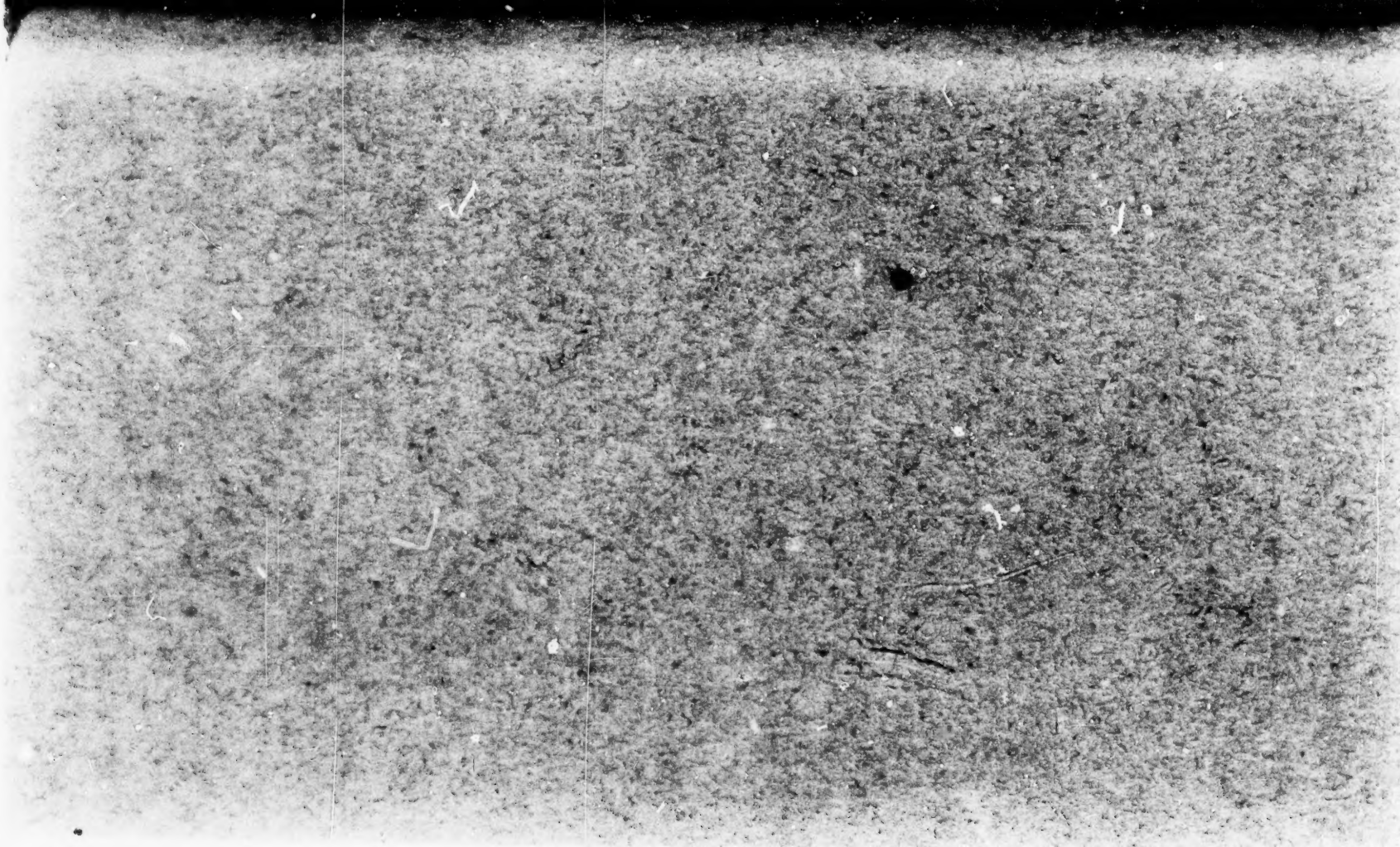

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BRIEF ON MERITS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 383

HOWARD R. MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the Court of Appeals (R. 54-65) is reported at 258 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals was entered July 22, 1958, (R. 65). The petition for writ of certiorari was filed September 19, 1958, and the petition was granted

November 17, 1958. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a criminal trial to a jury with character not in issue a defendant is denied a fair trial when members of the jury during the course of the trial read newspaper articles which state that the defendant has a record of two previous felony convictions and recite other defamatory matter.

STATUTE INVOLVED

The statute under which the petitioner was convicted was the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1042, 21 U.S.C. 331 (k); 52 Stat. 1051, 21 U.S.C. 353 (b) (1) (B). These sections provided:

> Prohibited Acts:
>
> 331. The following acts and the causing thereof are hereby prohibited:
>
> (k) ~~The~~ alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.
>
> 353. Exemptions in case of drugs and devices —
>
> (b) (1) A drug intended for use by man which —
>
> (B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practicioner licensed by law to administer such drug;

STATEMENT

On September 30, 1957, the petitioner who did not take the stand or present evidence of his own was found guilty (R. 4) on two counts of a three count information which had charged him with misbranding through indiscriminate dispensing of drugs without prescription in violation of said sections 331(k) and 353(b)(1) (B). Petitioner was committed for imprisonment on each of said two counts for a period of six months, the periods to run concurrently (R. 6-7). The petitioner appealed in part on the ground that he had been denied a fair trial by reason of the fact that members of the jury during the course of the trial read certain newspaper articles which set forth defamatory matters as to the petitioner and related that the petitioner had been convicted of felonies on two previous occasions (R. 1). The Court of Appeals for the Tenth Circuit affirmed the judgment and sentence holding that petitioner was not denied a fair trial by reason of said articles, Judge Murrah dissenting (R. 54-65).

SUMMARY OF ARGUMENT

The acts of the jury in reading such newspaper articles deprived the petitioner of some of the most vital elements of a fair trial. It was his right that the ju consider his case only from evidence received in open court. It was also his unqualified right under the circumstances that his previous convictions and alleged criminal activity not be brought to the attention of the jury. If the same matters were to have been raised in open court, with the defendant not taking the stand or presenting evidence on his behalf, a new trial would have resulted. No valid reason exists why this situation should be an exception.

ARGUMENT

WHEN A JURY DURING THE COURSE OF A CRIMINAL TRIAL READS DEFAMATORY MATTER INCLUDING STATEMENTS THAT THE DEFENDANT HAS HAD PREVIOUS FELONY CONVICTIONS, SUCH MATTER BEING INADMISSIBLE, THE DEFENDANT IS ENTITLED TO A NEW TRIAL OR MISTRIAL.

This case in brief concerned a trial of the petitioner for indiscriminate dispensing of drugs. The jury having been impaneled, the respondent presented its case alleging that on two occasions, the petitioner had dispensed drugs. The testimony of the chief government witness (R. 8-26, 32-34) was of such a nature that on request of petitioner's counsel an instruction on entrapment was given (R. 38). After the first day of trial, and after petitioner's counsel called the court's attention to the fact that members of the jury in the jury room were grouped about a newspaper, reading it (R. 27), it was discovered that two articles in separate newspapers (R. 52-53) had been read by members of the jury.

The jury being individually interrogated it was discovered that six of the jurors read one of the articles and two of the six read both. The government conceded having spoken to the newspapers but asserted this to have been only as to matters brought out in court, not as to the inadmissible and defamatory matters (R. 27). Those who were asked as to prejudice, denied that they had been prejudiced (R. 39-51). The newspaper articles stated: that petitioner had a record of two previous felony convictions; that while serving a forgery conviction petitioner testified before an Oklahoma state legislative committee

that he had only a high school education and that he wrote and passed prescriptions for dangerous drugs with ease; that petitioner had acted as physician and prescribed restricted drugs for one Hank Williams the country singer before his death; that petitioner was arrested with his wife and that she had been convicted on the drug charges in the same Federal court and she had been sentenced to 60 days in jail; and that "court attaches" said there was no evidence he was a doctor (R. 52-53).

The same information offered in open court would have been considered prejudicial since derogatory character evidence or evidence of previous criminal activity or conviction would not have been admissible. The authority for this proposition is found in *Michelson v. United States*, 335 U.S. 469, 475, 476, where this Court stated:

> "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." p. 475
>
> "The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." p. 476

See also, in accord with the above, the following cases, to the effect that such information is prejudicial error when presented in open court: *United States v. James*, 208 F. 2d 124, 125 (C.A. 2); *United States v. Rattan Co.*, 159 F. 2d 656, 658, (C.A. 2), cert. den. 331 U.S. 831; *Mackrath v. United States*, 103 F. 2d 495, 496 (C.A. 5).

Wigmore summarizes the thought on this point, *Wigmore on Evidence*, 3rd ed., 1940, '57, p. 456: "The rule,

then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."

As indicated above the rule as to the introduction of such matters in the in-court-situation is fixed and universally accepted. Any distinction or comparison that can be drawn between the in-court-situation where such matters are disclosed in open court, or on the other hand, the out-of-court situation which takes place in the jury room (R. 40) or home of a juror indicates that the firm rule as applied to the in-court-situation should be applied even more firmly in a jury room or out-of-court situation. In court, the disclosure would be subject to judicial control and would be over with in a matter of moments. Out of court the juror has the opportunity to read and re-read if he wishes. He has the chance to discuss with others including other members of the jury. He may at his leisure reflect upon what he has heard in open court in the light of what he now reads or hears out of court. Any deliberation the juror were to make in the jury room or out-of-court situation could not help but be tainted by the information so received. Consciously or subconsciously, matters ascertained in such fashion would weigh in the juror's thoughts.

It might be argued that the in-court-situation differs in that the prosecuting attorney in the majority of instances is at fault. This argument would not be sound since the reason for the rule is not to punish the misconduct of the wrongdoer but to rectify a wrong done the defendant and protect him in his well-established rights. This notion of fault has been used in the past, *United States v. Postma*, 242 F. 2d 488, 495 (C.A. 2), cert. den. 354 U.S. 922, with comment by Justice Frankfurter, where the fact that the government made no disclosures to newspapers was deemed relevant, and also in *United States v.*

Leviton, 193 F. 2d 848, 866 (dissenting opinon of Justice Frank), cert. den. 343 U.S. 946 with comment by Justice Frankfurter. Such arguments tend only to lead astray from the real question as to whether or not a fair trial was denied the defendant. Perhaps for this very reason the decision in the *Leviton* case, which did not involve matters as here involved, chose to use the "clear and present danger" test as to whether that defendant had been deprived of a fair trial, p. 857, citing *Ex Parte Craig*, 263 U.S. 255; *Baltimore Radio Show v. Maryland*, 67 A. 2d 497, cert. den. 338 U.S. 912, with comment by Justice Frankfurter.

The "clear and present danger" test, prior to the *Leviton* case had been confined to cases involving punishment of newspapers or other media for criminal contempt. Such rule has no application in this type of case, *United States v. Leviton*, 193 F. 2d 848, 866 (dissent of Justice Frank), Forer, *A Free Press and a Fair Trial*, 39 A.B.A. J. 860, 843, Comment, 59 Yale L.J. 534, 535-536, and see *Shepherd v. Florida*, 341 U.S. 50, 52. The criminal contempt cases, moreover, rely on the assertion that "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376. Such cases involve the effect on the judge, not the jury, of out of court news items and are concerned primarily with the punishment of newspapers, not the rights of the defendant. A notion of fault or punishment has no place here. It is that a wrong to the defendant resulted and that he was thereby deprived of a basic right.

The trial court concluded after interrogation that the jurors were not prejudiced (R. 31) and for that reason denied the motion of Petitioner for a new trial. When such matters come out in open court, the jury is not polled to determine the impact of the news item. Moreover as

Judge Murrah stated in his dissent, the untrained human mind could not disregard the alleged past criminal record of the petitioner. It would be expecting too much of a juror to admit prejudice under the circumstances (R. 64). Further, the defense of entrapment permitted by the trial court becomes valueless in the face of such disclosures. How can a plea of entrapment be made effectively to a jury that has read of a past criminal record? If one reason for excluding evidence of a defendant's past criminal record is that though relevant ". . . such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Michelson v. United States*, 335 U.S. 469, 475, such a reason should have still more persuasive application to the situation where a defense of entrapment has been permitted, and where predisposition of the defendant is so relevant. *Sherman v. United States*, 352 U.S. 369, 373.

The Supreme Court of Illinois in *People v. Hrycink*, 5 Ill. 2d 176, 125 NE 2d 61, (a decision reviewing authorities on the subject), had a somewhat similar case in which jurors during trial read of the criminal background of the defendant and did not admit prejudice on being interrogated. The Supreme Court there chose to disregard statements of the jurors and reversed the trial court, noting:

> "In any event the statement of a juror that reading a prejudicial newspaper article has not influenced him should not be considered conclusive. Basing the determination solely upon the statements of the jurors ignores and evades the real issue. The determination of that issue must, therefore, rest in the sound judicial discretion of the court to reach an inference, from all the facts and circumstances, that a fair trial has, or has not, been interfered with. Such inference is

however, a judicial discretion, the abuse of which will constitute reversible error. p. 184

"Obviously the most controlling fact or circumstance to create an inference is the character and nature of the prejudicial statements. p. 184

"It would be more in accord with human experience to suspect that, try as they might, such emotions would linger in the consciousness of the most honest juror and tempt him to disregard the fundamental requirement of a fair trial and resolve any doubts he might have against the defendant. That fundamental requirement is constitutionally guaranteed to the guilty and innocent alike. p. 185."

Much the same sort of reasoning is reflected in the statement of Justice Frankfurter, dissenting, *Craig v. Harney*, 331 U.S. 367, 392: "The fact that it cannot be demonstrated how the delicate balance of an adjudication was tampered with, or whether it was, does not prove that it was not tampered with."

Prejudice, for well accepted reasons, is assumed in a case of this sort where disclosures of criminal background are made in open court. The notion that prejudice should be established by petitioner in a jury room setting is inconsistent with the usual rule of the in-court-situation. It imposes a burden on the defendant which heretofore was not his. The difficulty of tracing and bringing out from jurors the effect of such publication of criminal background has been well summarized:

"Accurately to prophesy the influence and effect on the minds of jurors of what I have called the contraband information contained in these objectionable articles is, in my opinion, as impossible as it would be to foretell with any certainty the course of an infectious

disease among them." *United States v. Montgomery*, 42 F. 2d 254, 256 (D.C.S.D. N.Y.).

The *Montgomery* case also involved our situation of a past criminal record being read by a jury.

Those cases which involved disclosures to jurors during trial by newspapers or otherwise of the criminal background of the defendant, and in which new trials were thereupon granted, either chose to disregard statements of jurors that they were not prejudiced or deemed them irrelevant: *People v. Hryciuk*, 5 Ill. 2d 176, 184, 185, 125 NE 2d 61; *People v. Wong Loung*, 159 Calif. 520, 526-528, 114 Pac. 829; *Golden v. State*, 89 Tex. Crim. 525, 528-529, 232 SW 813; *Sprinkle v. State*, 137 Miss. 731, 742-744, 102 So. 844; *United States v. Ogden*, 105 Fed. 371, 373 (D.C. E.D., Pa.); *Babb v. State*, 18 Ariz. 505, 512-513, 163 Pac. 259; *Commonwealth v. Landis*, 12 Phila. Reports 576; *United States v. Montgomery, supra*. Also, such information was commented on in *Mattox v. United States*, 146 U. S. 140, 150, reversed on other grounds, with this Court stating: "It is not open to reasonable doubt that the tendency of the article was injurious to the defendant." The cases in this paragraph did not resolve the issue by taking statements of the jurors as conclusive but rather concluded that the well accepted rule excluding such evidence had been violated and therefor the defendant had been denied a fair trial. Some comments from the cases in this paragraph are set forth in the footnote below.*

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*__People v. Wong Loung__, . . . These allegations, even if true, could not have been received in evidence at the trial . . . No defendant should be convicted "on general principles" or because he is an undesirable citizen. This rule is so perfectly consonant with every rational man's sense of justice as to be axiomatic . . . pp. 525-526

__Commonwealth v. Landis__, A jury must try the cause according to the law and evidence. To that they are oath bound. p. 577

Not only would the test of prejudice verbally verified be inconsistent in the out-of-court situation but the interrogation of the jurors itself could well affect a defendant adversely. To probe into the juror's feeling could not help but impress the news item more definitely in his mind. Furthermore there is the very real likelihood of arousing the antagonism of a juryman by thorough questioning on behalf of the defendant. The few questions that petitioner's counsel dared ask of several of the jurors were asked with hesitation and to petitioner did not illustrate the impartiality of the jurors as the circuit court states, but rather illustrates the most delicate way in which petitioner's counsel was forced to proceed, and the hopelessness of such pursuit (R. 51, 58). It is a task comparable to asking a judge to disqualify himself for prejudice. A task which in the doing can easily create or enhance prejudice but not result in disqualification.

Petitioner's counsel found no case in which defendant did not take the stand, in which the criminal record was read or ascertained and in which a new trial was denied

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Sprinkle v. State, There is no difference between the jury getting this information from a newspaper and getting it from the testimony of witnesses. This was incompetent testimony thrown into the balance, obtained by a jury, probably innocently though not lawfully. p. 743

United States v. Ogden, It is unnecessary to say that such comments upon a pending case violate the elementary rules that demand justice and fair play to a man accused of crime. Under our system of jurisprudence . . . cases are tried upon evidence that is carefully scrutinized, and not upon insinuation and hearsay, and it is an attack upon the prisoner's constitutional rights to influence the jurors by presenting to their minds charges against him on which no evidence has been offered . . . p. 374

Babb v. State, It was new matter, foreign to the issue on trial, and could not, by any rule of evidence, have been introduced before the jury. p. 512

except for *Rowley v. United States*, 185 F. 2d 523, (C.A. 8) in which the defendant was referred to as an "exconvict." The case, in which the defendant appealed *pro se*, does not disclose if character had been put in issue. In any event this petitioner can only disagree with that decision. The circuit court cited *Gicinto v. United States*, 212 F. 2d 8 (C.A. 8), cert. den. 348 U.S. 884, and *United States v. Carruthers*, 152 F. 2d 512 (C.A. 7) but neither case is authority on these facts. In the *Gicinto* case there was no evidence that the article had been read p. 10 and in *Carruthers* the one juror who read could not remember the matters therein contained p. 519. Both courts so found in their rulings.

Support for our position on this question is found in the concurring opinion of *Shepherd v. Florida*, 341 U.S. 50, 53. A matter of equal importance to the one presented here, the reading of an alleged confession of the defendants, which confession was not introduced into evidence, was considered by the concurring opinion as in itself grounds for a new trial. To hold otherwise and permit the statements of jurors to control in matters that actually are prejudicial *per se* would substitute the conditioned, subjective reactions of jurors for the constitutional guarantees. Such matters must be considered as "ineradicably prejudicial", dissenting opinion of Justice Murrah (R. 65).

Assuming that the instant case involved only the matters presented in open court, can it be argued that the frame of mind of the jurors would have been the same had not the jurors read the newspaper articles presented in this case? Were it not suggested that the defendant in court has a criminal record, that his wife has been convicted on the same charges in the same court, that he previously prescribed and passed prescriptions for dangerous drugs, that he prescribed dangerous drugs for the well

known Hank Williams before his death, any jury would inevitably have a far different conception of the defendant than in the instant case. The delicate balance the law strives to maintain is irrevocably destroyed by such disclosures. Burden of proof, confronting of witnesses, withholding of character evidence, credibility of witnesses — all of these elements of a fair trial are gravely impaired.

The course of a trial can turn on many events and disclosures brought out in court. The reception of "evidence by newspaper" can alter the course of these events. As an example, the government's chief witness made an incredibly inconsistent statement resulting in withdrawal of the second count of the information and its dismissal (R. 6). First, this witness testified that he had placed certain drugs in a *prescription* type vial and sealed them in an envelope immediately after obtaining them from petitioner (R. 15, 16-19). When this witness broke the seal in open court he was unable to identify the drugs. On being recalled to the stand later, this same witness said he could now identify the drugs. He could do so, he said, because he had refreshed his recollection from his report. These drugs he now testified he had placed in an *aspirin* type bottle, that he knew so because he had written out his report the next day with the *aspirin* type bottle before him (R. 32-33). This conflicted with his statement of placing the drugs in a *prescription* type vial containing the drugs in a sealed envelope. If he had previously sealed the bottle, how could he, thereafter, have the bottle visible before him on his desk.

This point might have had weight as going to the credibility of the chief witness. Would it have the same weight if the jury read what it read, or if it had not? The balance of evidence achieved during trial, as in this instance, can easily be shifted by such "newspaper evidence." That

those balances were or were not affected is not subject to proof. But it cannot be denied there could easily have been such a tendency.

Trial by newspaper is not inevitable and encroachments on elements of a fair trial should not be permitted as necessary evils. The manner of tempering the impact of newspaper articles on juries during trial is not within the scope of this appeal. The concern here is that, guilty or not, a defendant must be given his right to a fair trial, trial by newspaper notwithstanding.

CONCLUSION

It is respectfully submitted, for the reasons above given, that the judgment of the lower court be reversed.

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